Supreme Court, U. S.
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No. 80-256

SUPREME COURT OF THE UNITED STATES

October, 1980 Term

RODNEY BRUCE GLENN - - - Petitioner

versus

ROSE L. SHIPP,
DAVID ARMSTRONG,
PAUL RICHWALSKY - - - - - Respondents

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS, ROSE L. SHIPP AND DAVID ARMSTRONG

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QUESTION PRESENTED

Whether or not State prosecuting attorneys have absolute immunity from claims for damages asserted against them under the Civil Rights Act, 42 U.S.C. 1983 and 42 U.S.C. 1985, where it is *not averred* that the prosecuting attorneys were acting other than in their role and capacity as prosecuting attorneys, and whether or not there are clearly different holdings between or among the United States Circuit Courts of Appeals.

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SUPREME COURT OF THE UNITED STATES

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v.

ROSE L. SHIPP,
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PAUL RICHWALSKY - - - - *Respondents*

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS, ROSE L. SHIPP AND DAVID ARMSTRONG

STATEMENT OF THE CASE

At all times material to this litigation, the respondent, David Armstrong, was the Commonwealth Attorney for the 30th Judicial District, which includes Louisville and Jefferson County, Kentucky. The respondent, Paul Richwalsky, was the first Assistant Commonwealth Attorney, and the respondent, Rose L. Shipp, was an Assistant Commonwealth Attorney.

The duties of the Commonwealth Attorney, the first Assistant Commonwealth Attorney, and the Assistant Commonwealth Attorney are set forth in Chapters 69.010 and 69.080 of the Kentucky Revised Statutes. The duties are to prosecute violations of the criminal

and penal law within the particular district they serve.

It is alleged that the Commonwealth Attorneys obtained an invalid search warrant and that they obtained a warrant for a strip search of the plaintiff, Rodney Glenn. Paragraph 40 avers that they procured an indictment on a misdemeanor charge and paragraph 41 says that they did this knowing that the limitation statute had run and for the purpose of having the plaintiff rearrested and a higher bond set. Paragraph 44 claims that certain property was ordered to be returned by the Jefferson Circuit Court and this has not been done. The subaverments in paragraph 47 appear to be a reiteration of those previously discussed.

Petitioner claims that the action of the respondents are outside the protection afforded them by *Imbler* v. *Pachtman,* 424 U. S. 409, 47 L. Ed. 2d 128, 96 S. Ct. 984, and that the decision of the Court of Appeals for the Sixth Circuit conflicts with decisions made by United States Courts of Appeals for the Third Circuit and Ninth Circuit and the District of Columbia.

The United States District Court for the Western District of Kentucky granted the respondents' motion to dismiss the complaint and this was summarily affirmed by the United States Court of Appeals for the Sixth Circuit. See appendix to petitioner's Petition for Writ, 13-23.

REASON WHY THE WRIT SHOULD NOT BE GRANTED

Respondents disagree with both of petitioner's claims. Respondents assert that the most liberal construction of the petitioner's complaint still places respondents' action well within *Imbler* v. *Pachtman, supra,* and respondents further assert that a careful reading of cases cited by the petitioner in support of his claim that there is a burning dispute between and among circuits relative to the meaning of *Imbler* v. *Pachtman, supra,* show they are not supportive of the claim.

The following facts were present in *Imbler* v. *Pachtman, supra.* Pachtman was a District Attorney. It was alleged that he had engaged in a conspiracy to unlawfully charge and convict Imbler by knowingly or negligently using false evidence and further that he suppressed material evidence at the criminal trial. This Court held Pachtman enjoyed absolute immunity and in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under the Civil Rights Act, 42 U.S.C. 1983 and 42 U.S.C. 1985. This Court always gave consideration as to whether a prosecutor should enjoy only qualified immunity or whether he should have absolute immunity. The Court said:

> "If a prosecutor had only a qualified immunity, the threat of §1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution.

A prosecutor is duly bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. Cf. Bradley v. Fisher, 13 Wall, at 348, 20 L. Ed. 646; Pierson v. Ray, 386 U. S., at 554, 18 L. Ed. 2d 288, 87 S. Ct. 1213. Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law."

We concluded that the considerations outlined above dictate the same absolute immunity under §1983, that the prosecutor enjoys at common law. To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system. Moreover, it often would prejudice defendants in criminal cases by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice. With the issue thus framed, we find ourselves in agreement with Judge

Learned Hand, who wrote of the prosecutor's immunity from actions for malicious prosecution:

> 'As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.' Gregoire v. Biddle, 177 F. 2d 579, 581 (CA 2, 1949), cert. denied, 339 U. S. 949, 94 L. Ed. 1363, 70 S. Ct. 803 (1950).

See Yaselli v. Goff, 12 F. 2d, at 404; cf. Wood v. Strickland, 420 U. S., at 320, 43 L. Ed. 2d 214, 95 S. Ct. 992."

It is not alleged in petitioner's complaint that respondents acted other than in their capacity as Commonwealth Attorneys, which imposed upon them the duty to prosecute violations of the criminal and penal laws within the 30th Judicial District. Securing a search warrant, a warrant for a strip search, procuring an indictment, investigation, examining and pursuing personal effects and business effects are all within the scope of the duties and obligations of a Commonwealth Attorney. The Commonwealth Attorney is a conservator of the peace. None of the actions alleged can be divorced or severed from the usual duties and obligations of a Commonwealth Attorney. Paragraph 37 says that the respondents conspired with other defendants so that respondents could investigate and examine and pursue said personal and business effects and files of the plaintiff without his knowledge or per-

mission and this resulted in a seizure of the plaintiff's property, both personal and business. It is difficult to decipher what this paragraph means and it is further impossible to determine what the petitioner meant by it. Paragraph 39 says that the respondents obtained an invalid search warrant which allowed examination, confiscation and investigation of personal and business effects found in a safety deposit box, and that they further obtained a warrant for a strip search. This is what Commonwealth Attorneys are supposed to do and it is part and parcel of their obligations and duties in the prosecution of criminal offenses alleged to have occurred within their jurisdiction. Paragraphs 40 and 41 allege that the respondent, Shipp, testified before the Grand Jury and procured petitioner's indictment knowing the limitation statute had run and for the purpose of having petitioner re-arrested and a higher bond set.

None of these averments come close to an allegation that a prosecutor knowingly used false evidence and knowingly suppressed material evidence in order to secure a conviction, as was alleged in *Imbler* v. *Pachtman, supra.* Prosecuting attorneys frequently appear before Grand Juries to establish pro forma matters, *i.e.,* previous convictions, the fact that a defendant did not appear, statistics, and the like. None of this can be reasonably divorced from the usual conduct of a prosecuting attorney and such pro forma appearance does not transform a person from a prosecutor to a witness.

Petitioner is wrong when he claims that the United States Court of Appeals are in conflict about the construction of *Imbler* v. *Pachtman, supra.* In *Jacobson* v. *Rose,* 592 F. 2d 515 (CA 9 Nev. 1978), the Court found that the prosecuting attorneys joined in implementing a wire tap, permission for which had expired. This was a statutory claim. The Ninth Circuit said the acts there were related to police activities as opposed to judicial activities and, therefore, absolute immunity was not present. Respondents have some reservations about this holding, but even so, it is not a law difference but a fact difference at most. *Forsyth* v. *Kleindienst,* 599 F. 2d 1203 (CA 3 Pa 1979), involved a warrantless electronic surveillance authorized by the Attorney General of the United States. The Court held that the record did not disclose whether the Attorney General was functioning as an administrator or whether he was securing information to determine whether to initiate a criminal prosecution and, accordingly, the Court would remand the case to determine that question. The Court concluded by saying, "We hold that the Attorney General will be absolutely immune from suit for his decision to authorize the warrantless electronic surveillances only if his decision was made in the performance of a function that is intimately related to the judicial process." The Court further said, "The decision to initiate a criminal prosecution, which we believe includes some limited right to gather information necessary to make that decision, is one such protected function."

First, this case supports respondents' view, and second, it does not represent a conflict with any other circuit. Nor does *Helstoski* v. *Goldstein,* 552 F. 2d 564 (3d Cir. 1977), support petitioner or represent a conflict because there the prosecutor deliberately leaked unfavorable and false information to the press. The Court said that this appeared to be outside of the rationale for absolute immunity. We have some problem reconciling all of this with *Gregoire* v. *Biddle,* 177 F. 2d 579 (CA 2 N.Y.), which case is cited in *Imbler* v. *Pachtman, supra,* as part of the basis for the decision there. *Briggs* v. *Goodwin,* 569 F. 2d 10 (CA DC 1977), is not helpful because the Court said that the special prosecutor was really an investigator as opposed to a prosecutor, and while we have some reservations about the holding of Briggs, particularly in light of the thoughtful dissent, it again does not represent such a major difference of opinion between or among circuits as to justify granting the writ here, nor is it analagous fact-wise here.

It must be remembered that the petitioner does not allege at any time that the respondents were acting outside of their normal and judicially related roles of prosecutors. Petitioner does not allege the Commonwealth Attorneys were investigators, police, special prosecutors, or that they did anything that Commonwealth Attorneys in Kentucky don't usually do when deciding whether to initiate a prosecution.

Petitioner asserts as his reason for granting the petition that there is a dispute between or among the Circuit Courts of Appeal. Respondents understand

that this can be a reason for this Court agreeing to hear a case. It is respondents' contention that the claimed dispute is fanciful and not real. Just because a different result may come from an individual court does not mean a dispute or difference of opinion exists. The difference in the cases cited by the petitioner to some degree involve subjective findings of fact by a particular court, but no damage seems to have been done to the basic proposition that prosecuting attorneys are immune from damages in a civil rights claim. In *Commissioner* v. *Bilder,* 369 U. S. 499, 9 L. Ed. 2d 65, 82 S. Ct. 881, we find the following language:

> "Because of a subsequent contrary holding by the Court of Appeals for the Second Circuit, Carasso v. Commission, 292 F. 2d 367, and the need for a uniform rule on the point, we granted certiorari to resolve the conflict. 368 U. S. 912, 8 L. Ed. 2d 130, 82 S. Ct. 193."

In *Bruning* v. *United States,* 376 U. S. 358, 11 L. Ed. 2d 772, 84 S. Ct. 906, the following is stated:

> "Due to an apparent conflict between circuits and the potentially recurring nature of the question involved, we granted certiorari, 375 U. S. 920, 11 L. Ed. 2d 164, 84 S. Ct. 264. We affirm the decision below."

In *SS Monrosa* v. *Carbon Black Export,* 359 U. S. 180, 3 L. Ed. 2d 723, 79 S. Ct. 710, this Court said:

> "Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the extent to which these bill of lading provisions may

be given effect by our courts can await a day when the issue is posed less abstractly."

Applying these statements to the case at bar, respondents do not find a recurring problem, the necessity of a judicial resolution by this Court, or a clear conflict as found in *Commissioner* v. *Bilder, supra.*

CONCLUSION

The District Court had little trouble with this case, and the Court of Appeals less. Petitioner has not, in our judgment, sustained his heavy burden to warrant this Court granting the writ he seeks.

WHEREFORE, the respondents, Rose L. Shipp and David Armstrong, respectfully demand that the Petition for Writ of Certiorari be denied and that they recover all other and proper relief in the premises as the circumstances warrant.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 1980, three copies of this Brief in Opposition on behalf of Respondents, Rose L. Shipp and David Armstrong, were mailed, postage prepaid to Mr. S. Arnold Lynch and Mr. Charles D. Kaplan, Attorneys for Petitioner, 414 Marion E. Taylor Bldg., Louisville, Kentucky, and Mr. Joseph G. Glass, Attorney for Respondent, Paul Richwalsky, 118 South Fifth Street, Louisville, Kentucky.

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